

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEONARD D. GAVIN)	
Claimant)	
VS.)	
)	Docket No. 216,075
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant and respondent both appeal from an Award entered by Administrative Law Judge John D. Clark on June 8, 1998, and the Award Nunc Pro Tunc entered June 9, 1998. The Appeals Board heard oral argument January 8, 1999.

APPEARANCES

Kelly W. Johnston of Wichita, Kansas, appeared on behalf of claimant. Frederick L. Haag of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier. Michael D. Streit of Wichita, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award. Claimant notes certain stipulations by the parties were not specifically mentioned in the Award. The Board has considered all stipulations by the parties including the three written stipulations claimant mentions: (1) the stipulation filed December 1, 1997, relating to introduction of a four-page printout of payments made by Aetna on claimant's medical bills; (2) the stipulation filed January 6, 1998, relating to introduction of the Boeing Central Medical file on both knees; and, (3) the stipulation filed March 16, 1998, relating to

whether respondent filed a report of accident as to the left knee and agreeing to the introduction of the Boeing Limited form.

ISSUES

This single docket claim involves two separate injuries and two separate awards, one for a right shoulder injury of July 11, 1990, and the second for a right knee injury which occurred on May 4, 1992. Claimant requests review of both awards. As to the award for the shoulder injury, claimant agrees with the award of a 56 percent work disability but contends the ALJ overlooked the parties' stipulation regarding temporary total disability. According to claimant, the parties stipulated that claimant was temporarily and totally disabled for 70 weeks and entitled to \$20,230 in temporary total disability benefits. The ALJ awarded only 10.43 weeks of temporary total disability benefits.

As to the knee injury, the ALJ awarded benefits for 5 percent to the right lower extremity. Claimant contends he suffered injury to both knees and is entitled to an award for a general body and work disability. Claimant disputes the finding by the ALJ that the claim for injury to the second (left) knee is time barred.

Respondent agrees with the award of 5 percent to the right lower extremity but disputes the award on the shoulder injury. Respondent contends the shoulder injury should be for a functional impairment only because claimant returned to work at a comparable wage and was later given a medical leave because of additional medical restrictions not related to his shoulder injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be modified. The Board finds claimant should be entitled to the 70 weeks of temporary total disability paid for the shoulder injury in the total amount of \$19,460.¹ The Board affirms the finding that claimant is entitled to a 56 percent work disability for the shoulder injury.

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the award for 5 percent of the right lower extremity should be affirmed. The claim for bilateral knee injury should be denied because claimant failed to make a timely written claim for injury to the left knee. Claimant is entitled to benefits for a 5 percent disability to the right lower extremity.

¹ This total differs from the amount paid to reflect the correct maximum rate of \$278 per week for a July 11, 1990, date of accident.

**Findings of Fact
Shoulder Injury**

1. Claimant injured his neck and left shoulder on July 11, 1990. The injury occurred when he lost control of the jackhammer-type gun he was operating.

2. Claimant reported the injury, and respondent provided medical treatment, including treatment by Dr. Robert L. Eyster. As of February 11, 1991, Dr. Eyster released claimant to return to work with restrictions against excessive pushing or pulling over 25 pounds and limited overhead work. Claimant returned to work and was put in the work pool until he was terminated for medical reasons in April 1993.

3. Claimant injured his right knee at work on May 4, 1992.

4. Claimant was terminated for medical reasons as of April 27, 1993.

5. By stipulation filed March 16, 1998, the parties agreed to the introduction of a document titled "BOEING LIMITED." That document reflects that claimant was laid off because of restrictions resulting from his shoulder injury.

6. James T. Molski, vocational expert, opined that considering all restrictions recommended by Dr. Eyster, including some for the knee injury, claimant had a 52 to 62 percent loss of ability to earn a wage. From restrictions for the shoulder only, the labor market loss, according to Mr. Molski, would be 55 to 60 percent.

7. At the regular hearing held in this case on September 16, 1997, respondent introduced an exhibit (Exhibit No. 1) that reflected respondent paid 50 weeks of temporary total disability for claimant's shoulder injury at the rate of \$289 per week for a total of \$20,230. There is obviously an error in this document because 50 weeks at \$289 per week would total only \$14,450. The \$20,230 would represent 70 weeks at \$289 per week. The same document also shows the dates of temporary total paid for the shoulder injury to be December 11, 1992, to April 14, 1994, a period of 70 weeks.

In addition, respondent introduced a separate document for the knee injury showing 20 weeks of temporary total disability at \$289 per week for a total of \$5,780, covering the period from April 15, 1994, to September 1, 1994.

Neither party made temporary total disability an issue. Nevertheless, the ALJ awarded only 10.43 weeks of temporary total disability for the shoulder injury.

8. Documents introduced as part of the claims adjustor's file show temporary total disability benefits were paid at \$289 per week for the two periods shown in Exhibit No. 1 to the regular hearing. But the documents show a different date of loss. The 70 weeks are

shown for a May 4, 1992, date of loss (the knee injury is alleged to have occurred on May 4, 1992) and the 20 weeks are shown for a June 8, 1992, date of loss. There does not appear to be an accident on June 8, 1992. The record of payments for a July 11, 1990, date of loss shows no temporary total disability paid. Neither party examined the claims adjustor about the temporary total disability payments, the deposition was taken for other purposes, and temporary total disability was not made an issue. Nowhere does the record indicate the significance of the "date of loss" shown on these records.

Conclusions of Law Shoulder Injury

1. The maximum temporary total disability rate for an accident on July 11, 1990, was \$278 per week and, based on the average weekly wage of \$642.61, claimant qualified for the maximum rate. Respondent paid at the rate of \$289 per week and the weekly rate should be corrected to conform to the limits that applied at the time of claimant's accident.
2. For reasons explained below, the Board concludes claimant should be awarded 70 weeks of temporary total disability at \$278 per week for a total of \$19,460.

As indicated, the ALJ took stipulations at the beginning of the regular hearing and at that time identified the issues in dispute. Respondent reported having paid what amounted to 70 weeks of temporary total disability benefits. Neither party indicated temporary total disability was to be an issue in the case. Neither party specifically addressed the issue in any of the later proceedings.

The evidence in the record is confusing. The accident occurred July 11, 1990, and claimant was released by Dr. Eyster as of February 11, 1991, 30.71 weeks after the accident. Although the shoulder injury quite possibly resulted in temporary total disability for other periods, the record does not establish what the dates were and does not establish a 70-week period of temporary total disability for the shoulder accident. As indicated, the record of the claims adjustor shows 70 weeks paid for a loss date which matches the knee injury but shows the 20 weeks paid for a date which does not match any injury date.²

The Board concludes the statements of counsel at the beginning of the regular hearing in this case should be treated as a stipulation. Claimant understandably did not present any evidence on the issue. There was no reason to do so. Where, as here, temporary total disability is paid and no issue is made of claimant's entitlement to temporary

² The Board also notes what may be an error in the period the permanent partial disability was reduced to functional impairment due to claimant having returned to work at a comparable wage. If the temporary total is subtracted from the number of weeks between the accident and the date claimant was terminated, the result differs from the 82.72 weeks claimed. However, neither party has addressed this question and since it is not certain there has been an error, the Board has not addressed this issue.

total disability, the award should be based on the number of weeks of temporary total disability paid.

The correction to the maximum rate is made because it is a legal question, while the number of weeks paid is a fact question to which the parties can stipulate.

3. The Board agrees with and affirms the conclusion that claimant has a 56 percent work disability attributable to the shoulder injury. Neither party disputes the extent of work disability, the 56 percent, if work disability is appropriate. But respondent contends claimant is not entitled to work disability for the shoulder injury. Respondent argues claimant left work for respondent because of the knee injury which he suffered after the shoulder injury. As found above, the Board concludes claimant was placed on medical leave because of restrictions due to the shoulder injury, not the knee injury. The award of work disability for the shoulder injury is, therefore, appropriate.

Findings of Fact Knee Injury

1. In May 1992, claimant injured his right knee while moving chairs, boxes, and other items.

2. After the May 1992 injury, respondent provided medical treatment for claimant's right knee with Dr. Eyster. Dr. Eyster had treated claimant dating back to 1989 for pain along the medial side of the right knee. An MRI done at that time showed degenerative meniscus changes but no specific tear. The physical examination suggested there possibly was a tear in the right knee. Claimant had complaints to both knees in 1989 and Dr. Eyster diagnosed a degenerative condition in both knees as well as the possible tear on the right.

3. Dr. Eyster's records of treatment after the alleged right knee injury of May 1992 contain no history of knee injury at work but Dr. Eyster testified he did not make a "big issue" of the cause of the injury. In May 1993, claimant complained to Dr. Eyster, for the first time since the May 1992 right knee injury, of problems with his left knee as well as his right. On April 26, 1994, Dr. Eyster performed surgery on both knees for patella femoral irritation. Dr. Eyster continued to treat claimant for both the shoulder and the knees through July 20, 1994. On August 31, 1994, Dr. Eyster rated claimant's impairment as 5 percent to each knee. He also recommended restrictions for the knees. He restricted against repetitive squatting and climbing of ladders.

4. Claimant served on respondent a written claim form stating claim for injury on July 11, 1990, and May 4, 1992. There is some dispute about when exactly this was served, but it was served before the last compensation (medical treatment) and would be

in time for accidents on the two dates stated in the written claim. The July 11, 1990, injury was to the shoulder. And, the Board finds the injury on May 4, 1992, was to the right knee only.

5. On August 23, 1996, more than two years after the last compensation (medical treatment) provided for the left knee, claimant filed an application for hearing alleging injury to his shoulder and right knee but did not mention the left knee.

6. At the time of the regular hearing on September 16, 1997, claimant's counsel advised claimant was making claim for bilateral knee injuries.

7. The parties have stipulated that respondent did not file an Employer's Report of Accident for injury to claimant's left knee.

8. The record contains several documents indicating respondent knew claimant had injury to his left knee as well as his right. These include a February 18, 1994, Aetna Request for Medical Consultant Review which mentions that claimant alleges injury to his knees. The claims adjustor's file also contains records from Dr. Eyster showing examination of, and problems with, the left knee. In addition, respondent paid for the surgery done for claimant's left knee in May 1994. The adjustor's file also contains a November 11, 1993, report from Steve Benjamin, a vocational specialist, which mentions problems with claimant's left knee and indicates claimant advised him that the pain in the left knee was from overcompensating for the right knee injury.

9. Claimant does not testify that he put additional stress on his left knee because of problems with his right knee. Claimant does testify that he believed he hurt both knees in the "original accident" and then while scraping sealer out on his hands and knees was the first notice of problem with both knees.

10. Claimant did not give Dr. Eyster a history of injury of either knee at work, even after the injury of May 1992, an injury which claimant generally testifies was to the right knee. As indicated, claimant did not make complaint to Dr. Eyster regarding his left knee until May 1993. Dr. Eyster, in response to a hypothetical question, agreed that if claimant had worked on his hands and knees since about 1979 this would have aggravated his knees. Claimant testified to some work on his hands and knees but not since 1979. Dr. Eyster also testified that overcompensation was a good explanation of what happened to claimant.

Conclusions of Law Knee Injury

1. Claimant is entitled to benefits for a 5 percent disability to his right knee.

2. Claimant did not make a timely written claim for injury to his left knee and the claim is barred under K.S.A. 44-520a.

Claimant makes two alternative arguments to avoid the time limits for written claim. First, claimant argues that respondent knew of the left knee injury but failed to file a report of accident. As a result, the time for written claim was extended to one year. K.S.A. 44-557. The Board agrees respondent had notice of injury to claimant's left knee. That notice is, as claimant argues, reflected in the respondent's records and by respondent's payment for surgery to the left knee. But the Board does not agree that the documents in the claims adjustor's file or any other documents in evidence amount to a written claim for injury to the left knee. Even if claimant had one year from the last payment of compensation, the documents cannot be considered a written claim by claimant of a compensable injury to the left knee. The earliest written claim would be the amendment to the application for hearing made at the regular hearing in September 1997, well beyond the one-year time limit.

Claimant also argues that the left knee injury was a natural and probable consequence of the injury to the right knee and, therefore, no additional written claim is necessary. The written claim for injury to the right knee is sufficient. But the Board finds the evidence does not establish that the left knee injury was a natural and probable consequence of injury to the right knee. Claimant does not give testimony which would support Dr. Eyster's indication that overcompensation would be a logical explanation for the injury to the left knee. And, Dr. Eyster's testimony appears to be speculation about possibilities rather than an opinion about what happened in this case.

The Board agrees with and affirms the finding that the claim for injury to the left knee is barred because claimant failed to make a timely written claim.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered on June 8, 1998, and the Nunc Pro Tunc entered on June 9, 1998, by Administrative Law Judge John D. Clark, should be, and hereby are, modified.

— SHOULDER INJURY —

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Leonard D. Gavin, and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety, and the Kansas Workers Compensation Fund, for an accidental injury which occurred July 11, 1990, and based upon an average weekly wage of \$642.61, for 70

weeks of temporary total disability compensation at the rate of \$278 per week or \$19,460, followed by 82.72 weeks at the rate of \$10.28 per week or \$850.36, for a 2.4% permanent partial disability, and then 262.28 weeks at \$239.92 per week, or \$62,926.22, for a 56% work disability, for a total award of \$83,236.58, all of which is presently due and owing, less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

— KNEE INJURY —

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Leonard D. Gavin, and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety, and the Kansas Workers Compensation Fund, for an accidental injury which occurred May 4, 1992, and based upon an average weekly wage of \$747.18, for 20 weeks of temporary total disability compensation at the rate of \$289 per week or \$5,780, followed by 9 weeks at the rate of \$289 per week, or \$2,601, for a 5% permanent partial scheduled injury to the right leg, making a total award of \$8,381, all of which is due and owing, less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Frederick L. Haag, Wichita, KS
Michael D. Streit, Wichita, KS
Christopher J. McCurdy, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director